U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20608366

Date: JUNE 8, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a stage actor, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. We dismissed the Petitioner's appeal, concluding that the Petitioner satisfied the initial evidentiary requirements, but did not establish, as required, that she has sustained national or international acclaim and is an individual in the small percentage at the very top of the field. The Petitioner filed a combined motion to reopen and reconsider, which we dismissed as untimely. The matter is now before us on a second combined motion to reopen and reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motion.

I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to individuals with extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation; who seek to enter the United States to continue work in the area of extraordinary ability; and whose entry into the United States will substantially benefit prospectively the United States. The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)–(x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets the initial evidence requirements (through either a one-time achievement or meeting three lesser criteria), we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. MOTION REQUIREMENTS

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

A petitioner must file a motion to reconsider within 30 days of the decision that the motion seeks to reconsider. A petitioner must file a motion to reopen within 30 days of the decision that the motion seeks to reopen, but a delayed filing may be excused in our discretion if the delay was reasonable and was beyond the petitioner's control. 8 C.F.R. § 103.5(a)(1)(i).

III. ANALYSIS

On September 11, 2020, U.S. Citizenship and Immigration Services (USCIS) extended temporary filing flexibilities relating to USCIS requests, notices, and decisions issued on or before January 1, 2021. In its announcement, USCIS stated:

> USCIS will consider a response to the above requests and notices received within 60 calendar days after the response due date set in the request or notice before taking any action. Additionally, we will consider a Form N-336 or Form I-290B [Notice of Appeal or Motion] received up to 60 calendar days from the date of the decision before we take any action.[1]

The flexibilities described above were in effect when we dismissed the Petitioner's appeal on December 28, 2020. The Petitioner mailed her first motion on March 9, 2021; USCIS received the

[1] *See* https://www.uscis.gov/news/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-1.

filing on March 15, 2021, 77 days after we issued our appellate decision. The date of receipt is considered to be the filing date. *See* 8 C.F.R. § 103.2(a)(7).

The Petitioner's first motion included a letter acknowledging the untimely filing, blaming the "misleading and contradictory" wording of USCIS' public notice for leading the Petitioner to believe, at first, that the deadline to file a motion had been extended for 60 days. We dismissed the motion, stating that the Petitioner's explanation did not establish that the delay in filing was reasonable and beyond the Petitioner's control.

In her second motion, the Petitioner repeats the assertion that USCIS' guidance was ambiguously worded. The Petitioner states: "a plain reading of the USCIS notice . . . informed that the deadline for filing the I-290B was 60 days after the response due date – in this case, March 30, 2021." The Petitioner contends that the USCIS notice effective established two different deadlines, and that her first motion was timely because she filed it before the second deadline.

The Petitioner, however, misreads this guidance. The USCIS notice gave parties an additional 60 days to submit a "response" to a "request or notice," but a motion is not a response to a request or notice. Rather, it is a filing, accompanied by a fee. We note that the same USCIS notice refers, elsewhere, to a "request, notice, *or decision*," thereby differentiating between the three types of USCIS communication. The same USCIS notice extended the filing period for Form I-290B to a *total* of 60 days, which effectively grants a 30-day extension. The Petitioner acknowledged as much in the letter that accompanied the first motion.

By regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). Therefore, the filing before us is not a motion to reopen and reconsider the denial of the petition or the initial dismissal of the appeal. Instead, the filing is a motion to reopen and reconsider our most recent decision, which rested entirely on the issue of timeliness.

The Petitioner has not shown any error of fact or law in our dismissal of the first motion. Therefore, the latest motion does not meet the requirements of a motion to reconsider. Likewise, the latest motion does not include any new facts that bear on the dismissal of the previous motion. Therefore, it does not meet the requirements of a motion to reopen.

The latest motion includes the same evidence submitted with the previous, untimely motion. Apart from prefatory language concerning the delay in filing the March 2021 motion and filing flexibilities, the accompanying brief is identical to the brief filed with the earlier motion. Re-filing the same motion does not overcome the prior untimely filing. Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)).

Furthermore, while 8 C.F.R. § 103.5(a)(1)(i) gives us discretion to accept an untimely motion to reopen if the delay is reasonable and beyond the Petitioner's control, there is no such provision for untimely motions to reconsider.[2]

[2] A motion to reopen may be delayed by efforts to locate and obtain supporting evidence, a factor that would not come into play for a motion to reconsider where new evidence is not accepted.

Even so, we will briefly note that the Petitioner's prior motion, even if it were timely, would not likely have resulted in approval of the petition. The Petitioner argues that "New York City is the center of theater in the United States, and arguably the world, therefore, theater actors in New York City do enjoy a level of national and international success, as they are often viewed and recognized by theater goers worldwide." We do not agree with this assertion. The presence of acclaimed actors in New York does not compel the conclusion that *every* actor in New York is, therefore, acclaimed, or that acting in New York inherently conveys sustained national or international acclaim. The evidence submitted by the Petitioner shows that there is a hierarchy of theaters in the city, including "Broadway, Off-Broadway, and Off-Off-Broadway."

The remainder of the brief concerns the Petitioner's satisfaction of individual evidentiary criteria under 8 C.F.R. § 204.5(h)(3), although we have already found that she satisfied three of those criteria. For instance, the Petitioner submits information about famous actors who received a particular theatrical award. She essentially claims that, because she received the same award, we should infer that she has achieved a comparable level of acclaim. While some prominent actors received the same award, the Petitioner does not show that they achieved their prominence through the performances that won the award. Rather, she identifies them as winners or nominees of higher-profile awards such as the Academy Award and the Golden Globe, which the Petitioner herself does not claim to have won.

Furthermore, the Petitioner does not document that her receipt of the award resulted in significant media attention or coverage. The media coverage documented on motion consists of local television appearances to promote upcoming productions, with no indication that these broadcasts reached a national or international audience and were, therefore, able to contribute to acclaim beyond a local level. A local station's affiliation with a national or international network does not inherently establish that the larger network carries all the local affiliate's programming.

We will not further discuss the arguments and evidence submitted with the first motion, because it lies beyond the proper scope of the motion now under consideration limited to a procedural question. But the brief discussion above serves to demonstrate that the procedural issue is not the sole barrier between the Petitioner and the highly restrictive immigrant classification she seeks, and the Petitioner has not submitted sufficient evidence to demonstrate that she has achieved sustained national or international acclaim to qualify for the classification.

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration and has not overcome the grounds for dismissal of the appeal. We will therefore dismiss the motion to reopen and motion to reconsider.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.